IN THE

Supreme Court of the United States

OCTOBER TERM 1944

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION

The opinion of the District Court has not been reported. The opinion of the Circuit Court of Appeals is reported at 144 F. (2d) 571.

Jurisdiction

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 18, 1944, following the denial of a petition for rehearing or modification of the opinion on October 9, 1944 (pp. 2465, 2467). The jurisdiction of this Court is involved under Section 240-A of the Judicial Code as amended by the Act of February 13, 1935.

Statement of Facts

The relevant facts are stated in the respective Point headings.

Specification of Errors

It is submitted that the Court below erred:

(1) In holding that petitioner's claim against the Manhattan Railway Company assumed by the City of New York under Article Six (8)(d) should be allowed only to the extent of benefit to the receivership estate.

(2) In overruling the construction of Article Six (6), agreed upon by the parties and found by the Special Master and the District Court, that petitioner was entitled to compensation thereunder for his services to the Manhattan Railway Company to the extent not compensated under Article Six (8)(d).

As stated in the petition, and as hereinafter more fully demonstrated, the Court below decided the cause in conflict with the applicable decisions of this Court and other Circuit Courts of Appeals and departed from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

The Services

A brief statement will suffice to show a startling disproportion between petitioner's work and accomplishments as contrasted with the compensation heretofore allowed.

Petitioner devoted something over seven and a half years as chief legal representative of the interests of the Manhattan Railway Company and its stockholders. As noted by Judge Hulbert, his office operating "loss [for the receivership period] is just about covered by the allowances" heretofore received (fol. 7295). Outstandingly successful results were achieved in difficult litigation lasting many years.

At the inception of his work the Manhattan Railway Company was in a most precarious condition. Its major tangible asset, the lease to the Interborough Rapid Transit

Company, was threatened with extinction, its lines and plants with demolition, all its properties with foreclosure. The situation was deemed "hopeless" by competent parties, such as Mr. Richard E. Dwight, member of the firm then representing the Manhattan receiver (fol. 497).

Up to May 15, 1940 there had been 63 written opinions by the District Court, 474 orders and 804 documents. The printed record comprises 15,143 pages; the stenographic minutes over 20,000 pages, including several special proceedings referred to various Special Masters—as the Roberts removal proceedings, the Formula litigation, Claims, Foreclosures, etc. There were many lengthy controversies, almost all affecting the Manhattan Company directly or indirectly. Petitioner participated actively. His office diary (Pet. Ex. 115), occupies 274 pages of this record, pp. 1607-1881. He attended 258 hearings (Pet. Ex. 117, fols. 5681-5703). His briefs on the important issues were put in evidence. Petitioner's Exhibit 116, folios 5644-80, lists 72 arguments which he made.[1] The Special Master who took a narrow concept of the nature, extent and effectiveness of petitioner's solicitor work takes up 26 pages of his Report on services involved in the proceedings. In his capacity as

[1] The work included many appeals in which petitioner took the laboring or at least one of the oars. The published reports show petitioner's participation in *Johnson* v. *Manhattan Railway Co.*, 289 U. S. 479, 61 Fed. (2d) 934, 1 Fed. Supp. 809; *Roberts* v. *City of New York*, (42nd Street Spur Case), 295 U. S. 264; *Matter of City of New York*, 265 N. Y. 170; *Murray* v. *Roberts* (Disaffirmance litigation), 103 Fed. (2d) 889, cross-application to Supreme Court for certiorari (No. 552, October Term, 1939) in which petitioner filed separate brief withdrawn upon assurance of Unification; *City of New York* v. *Murray*, 273 N. Y. 447, 248 App. Div. 102; *American Brake Shoe & Foundry Co.* v. *Interborough Co.*, 10 Fed. Supp. 512; *City of New York* v. *Interborough Co.*, 76 Fed. (2d) 1002, 10 Fed. Supp. 512; *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.* (Sale of Manhattan's Sixth Avenue Line), 99 Fed. (2d) 789, certiorari denied 306 U. S. 641. Appeals were also perfected and briefed in the Federal and State Courts, but which were not reported, as in the case of *Transit Commission* v. *Manhattan Railway Co.* (Signal application) before the Appellate Division of the State Supreme Court (fol. 1152), etc.

general counsel petitioner carried on a large volume of corporate office work described at folios 41-105, and folios 802-38.

The struggle was a legal one, and Mr. Cuthell, special counsel for the Transit Commission, agent for the City in unification, has attested petitioner's skill, tenacity and assistance "in the very difficult matter of representing the Manhattan stock * * *" (fol. 5816).

The Special Master found that "There was no dispute but that Franklin spent most of his time during the receivership proceedings on Manhattan and receivership matters * * * For the most part the fact that Mr. Franklin performed such services has not been opposed" (fols. 6713-14, 6635).

The Ouster of Judge Manton

We mention these proceedings, which constituted in point of time only a relatively minor part of petitioner's services, because they came to the attention of members of this Court and show the courage and originality of his work.

It is no reflection on the other able attorneys active in the receivership to say that the only really notable legal effort in the entire proceeding was petitioner's ouster of Judge Manton. After Judge Manton injected himself into the case, under circumstances which in petitioner's view were prejudicial to his client, he was sufficiently courageous to attack Judge Manton's jurisdiction in a suit decided by this Court in *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479. Although this Court sustained Judge Manton's authority it criticized his exercise of his jurisdiction and admonished him to relinquish it. When Judge Manton refused to do so petitioner commenced a proceeding in this Court, entitled *Ex parte Manhattan Railway Company*, for a writ of prohibition against Judge Manton's continuance in the case, the petition reciting Judge Manton's arbitrary conduct. An asso-

ciate of petitioner procured a restraining order from Mr. Chief Justice Stone, then an Associate Justice. Petitioner opposed before Mr. Justice Stone the motion of counsel for the Interborough and Manhattan receivers to vacate this restraining order. When Mr. Justice Stone, without finally ruling, indicated his dissatisfaction, Judge Manton voluntarily withdrew, immediately prior to the argument in this Court of the application for the writ of prohibition.

POINT I

When an allowance is sought for services to a private litigant, to be paid by a private litigant, and not to be paid from the receivership estate, the amount of the allowance is not controlled by benefit to the receivership estate.

The obligation of the City of New York, held by the Courts below to be limited by the "principle" of "benefit to the receivership estate", is expressed in Article Six (8) of the Unification Plan, reading in part as follows:

> "(8) Except as otherwise expressly provided in paragraph (5) of this Article, the City, on the date of consummation, will assume all debts and liabilities of and claims and demands against the Interborough Company or the Manhattan Company, contingent or otherwise, outstanding on or as of said date * * * Without limiting the generality of the foregoing, the City shall assume:
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> "(d) * * * allowances, if any, which may be made by the District Court to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings; and allowances, if any, which may be made by the District Court to the solicitor for the Committee for the Ten-Year Unsecured 6% Gold Notes of the Interborough Rapid Transit Company of which Dwight F. Faulkner, Jr., is Chairman for services rendered to the receivership estates as distinguished from services rendered to said Committee;

> "(e) to the extent not paid pursuant to the provisions of Sections II and III of Article One hereof, allowances for the services and expenses of the Mortgage and Indenture Trustees, their counsel and engineers, as determined by the District Court, including allowances for services and expenses, if any, performed or incurred after the date of consummation * * *."

That a corporation in receivership may incur debt for legal services and otherwise has repeatedly been held, *Louisville &c. R. R. Co.* v. *Wilson*, 138 U. S. 501, 509; *Priest* v. *Wells*, 282 Fed. 57, 60 (C. C. A. 8th); *Straus* v. *Baker Co.*, 87 F. (2d) 401, 410 (C. C. A. 5th); *In re Hollis Lumber Co.*, 55 F. (2d) 898 (C. C. A. 2d); cf. *Walker* v. *L. Maxcy, Inc.*, 103 F. (2d) 24, 26 (C. C. A. 5th); *Atlas Ry. Co.* v. *Lake & River Railway Co.*, 134 Fed. 503, 505 (N. D. Ohio).

Petitioner seeks to liquidate this debt arising from the legal services and collect it from the City of New York under Article (8)(d), *supra*, or under paragraph (6).

The Court below ruled that the liquidation must be "in accordance with the principle which controls the allowance of counsel fees in receivership cases, namely, benefit to the receivership estate" (p. 2449).

We respectfully submit that no such principle applies when the attorney is seeking not compensation from the receivership estate but a determination of the amount of his claim for services to a private litigant.

In *Sprague* v. *Ticonic Bank*, 307 U. S. 161, this Court sustained the right to an allowance of counsel in a receivership proceeding who had done nothing for the receivership estate as such, but had established a precedent of advantage to a number of creditors respecting their share of the receiver's assets. This Court said inter alia at p. 167:

> "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

Subsequently, in *Sprague* v. *Ticonic Bank*, 110 F. (2d) 174 (C. C. A. 1st), that Court expressly overruled the contention that because no benefit had accrued to a fund in court, counsel should receive no allowance, saying (at p. 176):

> "This asserted limitation upon the power of the court of equity to award reimbursement of counsel fees and expenses seems to us squarely in conflict with the decision of the Supreme Court in 307 U. S. 161."

In *Crump* v. *Ramish*, 86 F. (2d) 362 (C. C. A. 9th), an equity receivership, the claimant attorneys represented certain creditors who received securities pursuant to the reorganization plan. The attorneys applied for and received a fee of $25,000 from the receivership estate. They then applied for a fee to be paid from the securities allocated to their clients. The District Court dismissed the petition for want of jurisdiction but the Circuit Court of Appeals reversed and directed that the petition be considered on the merits.

In at least two cases the Circuit Court of Appeals of the Second Circuit has held that attorneys whose services do not benefit the estate as such, but do benefit one class of creditors at the expense of another class, are entitled to compensation from the class so benefited, and that the receivership court may fix the appropriate sum. *Clark* v. *Goldman*, 124 F. (2d) 491, 493; *Nolte* v. *Hudson Navigation Co.*, 47 F. (2d) 166, 167. The validity of such allowances was expressly recognized in *Warren* v. *Palmer*, 132 F. (2d) 665, 668.

The same result was reached by the Court in *Palmer* v. *Watson*, 122 F. (2d) 598, another allowance proceeding in the Interborough-Manhattan receivership itself. There the Court said (at p. 600) that the allowance must turn "on what was done that was beneficial", but the claimant attorneys for the Manhattan 7% Stock Committee asserted no benefit to the receivership estate, only benefit to the 7% Stock.

In none of these receivership cases was the principle of benefit to the receivership estate applied in determining counsel's allowance.

The Unification Plan as matters of language and of practice did not limit the allowance to benefit to the receivership estate.

1. *As a matter of language.* Paragraph (8) deals with claims against Interborough and Manhattan Companies. The only limitation is that applicable to the counsel for the Interborough 6% Note Committee, whose allowance, unlike petitioner's, was restricted to "services rendered to the receivership estates as distinguished from services rendered to said Committee". Not only the absence of any limiting language in the reference to petitioner, but the positive inclusion of such language in reference to the Committee attorney, emphasize the agreement that the claim be recognized and paid.

Also, Article Six, paragraph (5), provides that the City will *not* assume or pay:

> "(d) Any legal, accounting, engineering or other expenses or compensation of * * * Manhattan Railway Company, *other* than any allowance which may be made * * * pursuant to the provisions of subdivision (d) of paragraph (8) of this Article * * *" (Plan, p. 44).

Plan Definition No. (5) provides:

> "* * * The term 'Manhattan Railway Company' shall mean the corporation itself and shall not include its receiver or the receivership estate" (Plan, p. 3).

Thus Article Six (5) treated (8)(d) as relating to a claim against the Company and not a claim against the receivership estate.

2. *Ordinary claimants.* All ordinary claimants against the two companies have been paid in full on the basis of

their claims against the companies.[1] Cf. *165 Broadway Building* v. *City Investing Co.*, 120 F. (2d) 813, 816 (C. C. A. 2d).

3. *Other attorneys.* Among the claims that the City assumed were listed, "without limiting the generality of the foregoing",

> (8) "(e) to the extent not paid pursuant to the provisions of Sections II and III of Article One hereof, allowances for the services and expenses of the Mortgage and Indenture Trustees, their counsel * * *" (Plan, p. 48).

The exception to "contracts or agreements relating to the employment of counsel" mentioned at page 2448 of the opinion below, obviously referred to Interborough's many outstanding contracts with counsel engaged in negligence and other carrier activities, since under the terms of the Manhattan lease, Interborough had sole charge of and responsibility for Manhattan's litigation from January 1, 1903, the effective date of said lease.

No reason has been suggested why the allowances provided in (e) should be measured differently from petitioner's. Nevertheless substantial allowances were made on applications making no pretense of benefit to the receivership estate.

Sections II and III of Article One authorized payment of allowances to the Trustees and their counsel from funds in their possession before the balance was turned over to the City (Plan, pp. 13-15). These funds sufficed for the allowances to the respective first mortgage trustees, Central Hanover Bank and Guaranty Trust Company (R. R. 14431-2, 14879). The Chase National Bank of the City of New York, Trustee of the Manhattan Second Mortgage,

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[1] This does not appear in the record, but we have been so informed by attorneys for the principal claimants. In the Court below the City did not deny this assertion on our part that ordinary claimants had been so paid.

had no funds on hand, and Bankers Trust Company, Indenture Trustee for the Interborough 7% Notes, had only negligible cash. Not being able to recover compensation under Sections II and III of Article One it was necessary for them to seek relief under paragraph (8). This they did. The Chase National Bank and its counsel Messrs. Milbank, Tweed & Hope, and Bankers Trust Company and its counsel Messrs. White & Case, submitted petitions for allowances in which there was not the slightest suggestion of benefit to the receivership estate, but there were, on the contrary, set forth services to their respective security holders (R. R. 14333-50, 14480-502). These applications were allowed in substantial amounts (fols. 353, 356). At no time has either the City or either of the Courts below suggested the slightest basis for differentiation between these trustees and their counsel on the one hand and petitioner on the other.

POINT II

When similar applicants in the same cause and in other receivership causes had not been restricted to the rule of benefit to the receivership estate it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to do so in determining the allowance to petitioner.

The facts on which this Point is based are stated in Point I.

POINT III

When the parties, the Special Master and the District Court had concurred in the meaning and intent of Article Six (6) it was a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to adopt a wholly different construction.

Petitioner asserted that if (8)(d) is to be construed as imposing upon the City only his claim against the receivership estate, then his claim against the Company should be liquidated under Article Six (6) providing that:

> "The legal, accounting, engineering and other expense and compensation of the Manhattan Railway Company (except as otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), *whether heretofore or hereafter agreed to be paid* [1] * * * " (Plan, p. 45).

should be borne by the securities and cash allocated to the Manhattan stockholders.

It seems self-evident that if (8)(d) means only the obligation of the receivership estate, the obligation of the Company is not excepted by the parenthetical clause and is covered by paragraph (6). Paragraph (6) does not except petitioner; it excepts what (8)(d) provides as to petitioner, whatever that may be.

Although the City of New York, the Special Master and the District Judge all maintained that paragraph (6) did cover petitioner's services to the Company and not otherwise compensated, the Circuit Court of Appeals held he could take nothing under paragraph (6) irrespective of inadequacy of other compensation.

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[1] Italicized language omitted in the quotation from this paragraph by the Court below (p. 2449).

The City's construction of paragraph (6) was expressed in the District Court by the affidavit of Assistant Corporation Counsel Gaud as follows (fols. 479-82):

> "11. * * * Mr. Reavis and Mr. Franklin pointed out that, as concerned their allowances which were to be charged against the corporate stock and cash going to the stockholders, certain resolutions had already been adopted by the Manhattan Board of Directors respecting the amount of compensation to which the Board thought they were entitled. Article Six, paragraph 6, was accordingly changed at their suggestion so as to make it clear that legal expenses of the Manhattan '*whether heretofore or hereafter agreed to be paid*' (these words were emphasized in Mr. Gaud's affidavit by underlineation), were chargeable against the Corporate Stock going to the stockholders.
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> "12. * * * before preparing this affidavit, I discussed the matter of how these changes came to be made in the Plan with some of the other lawyers who were present at the time, and they confirm what is here stated.
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> "13. * * * As to paragraph 6 of Article Six, express language was included so as to let Mr. Franklin try to take advantage of the agreement with the Board of Directors when he went against the stockholders."

Mr. Gaud's affidavit is all the City filed in answer to the supplemental petition and is in the nature of a pleading, stating the City's theory of the case (fols. 464-83).

Even in the Circuit Court of Appeals the City conceded liability under paragraph (6), although contending that the liability had already been discharged. The City said (Brief, p. 13):

> "Under the Plan, assenting stockholders were liable for legal services, not under contracts made with Manhattan, but to the extent of the worth of such services as were beneficial to them and as determined by the District Court."

The Special Master found that Article Six (6) covered the services to the Company (fols. 6750-3). The District Court (Hulbert, D. J.) necessarily found that petitioner's services to the Company came under Article Six (6) by allowing $15,000 on the supplemental petition.

Responsibility for the grave miscarriage of justice in this cause: The services are based on undisputed written evidence and there was no issue of evidentiary fact in the case.

Up to the date that the petitioner filed his application for allowance there was no suggestion of criticism. As noted above, Mr. Cuthell commended petitioner's skill, tenacity and assistance "in the very difficult matter of representing Manhattan stock * * *" (fol. 5816). In the City's briefs before the Court below involving other parties the City uniformly spoke well of petitioner's work.[1]

The City being unable to meet the issues, indulged in a vindictive personal attack upon petitioner for which there was no justification.

Petitioner was admitted to the Bar May 11, 1903; he has had an active successful career before the Federal and State Courts.

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[1] For example, the City's brief in the *Palmer-Watson* case (122 F. (2d) 598), states in discussing the services of other counsel in the Formula and Disaffirmance litigations: "They followed the lead of others who represented far more substantial interests. In the Formula and Disaffirmance proceedings, and in all proceedings relating thereto, *the laboring oars were taken by * * * Manhattan Railway Company itself*" (fol. 7019), that is, by the petitioner.

In another brief (122 F. (2d) 552), referring to *Ex parte Manhattan Railway Co.*, the City says: "Mr. Boehm assumes throughout his brief that his standing is identical with Mr. Franklin's. That is, of course, not the case" (p. 23).

We quote excerpt from the City's brief in the Court below to illustrate their bias and impropriety:

> "In his attempt to obtain an allowance in this proceeding, Franklin's conduct and testimony were calculated to mislead the Court. Consequently he forfeited any right to an allowance."

The above calumny was set up as a separate point, and upon counsel's unsupported opinion, the City virtually demanded the denial of petitioner's right to compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated, New York, January 9, 1945.

Respectfully submitted,

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.